



Federal Communications Commission
Washington, D.C. 20554

January 7, 2020

DA 20-17

Timothy E. Welch
Hill & Welch
1116 Heartfields Drive
Silver Spring, MD 20904

RE: Nemont Telephone Cooperative, Inc. - Request for Rule Waivers for Call Signs WQJU690, WQJU692, and WQJQ771

Dear Mr. Welch:

This letter addresses a request for waiver of a construction requirement (Request) filed by Nemont Telephone Cooperative, Inc. (Nemont)¹ on behalf of its wholly-owned subsidiary, Sagebrush Cellular, Inc. (Sagebrush or Licensee), the licensee of the above-referenced three 700 MHz stations (CMA525-Montana 3-Phillips; CMA532-Montana 10-Prairie; and CMA529-Montana 7-Fergus) (Licenses).² Nemont seeks a complete waiver of the applicable construction requirement, with no review of the Licenses' construction status until the end of the subsequent renewal period.³

For the reasons discussed herein, we find that Nemont has not shown unique or unusual circumstances to support a waiver. We therefore deny the Request as it applies to call signs WQJU690 and WQJU692, and we dismiss the request for a construction waiver for call sign WQJQ771 as moot.⁴ Because we deny the Request for call signs WQJU690 and WQJU692, these two licenses terminate automatically, and we therefore dismiss Nemont's renewal applications as moot. For call sign WQJQ771, as discussed below, we also deny the request to waive the renewal requirement and will address its pending renewal application separately.

Background. Pursuant to Section 27.14(g) of the Commission's rules, lower 700 MHz B Block licensees must "provide signal coverage and offer service over at least 35 percent of the geographic area of each of their license authorizations" by June 13, 2013, later extended to December 13, 2016 (Interim Requirement), and "provide such service over at least 70 percent of the geographic area of each of these

¹ Nemont provides wireless services to rural areas in Montana through Sagebrush and its other wholly-owned subsidiary, Nemont Communications, Inc. See Waiver Request, Call Sign WQJU690, File No. 0008688193, at 1 (filed June 13, 2019).

² See Waiver Request, Call Sign WQJU690, File No. 0008688193 (filed June 13, 2019), and Waiver Request, Call Sign WQJU692, File No. 0008688213 (filed June 13, 2019). For call sign WQJQ771, the request to waive a construction requirement was filed in connection with the licensee's renewal application. See Supplemental Renewal Statement and Waiver Request, Call Sign WQJQ771, File No. 0008572490 (filed June 13, 2019). The Request was also filed in connection with the renewal applications of call sign WQJU690 and call sign WQJU692. See File No. 0008572491 and File No. 0008572493.

³ Nemont requests a waiver of its construction requirement in Section 27.14(g) of the Commission's rules, 47 CFR § 27.14(g), pursuant to Section 1.925(b)(3)(ii) of the Commission's rules, 47 CFR § 1.925(b)(3)(ii). Although Nemont requests that the Licenses not be subject to a renewal review at this time, it only seeks a waiver of Section 27.14(e), 47 CFR § 27.14(e), for call sign WQJQ771 and does not explicitly request a waiver of the renewal requirement for call signs WQJU690 and WQJU692.

⁴ As explained herein, the previous licensee of call sign WQJQ771 met the end of term construction requirement for this license in 2016.

authorizations” by the end of the license term, which here was June 13, 2019 (Final Requirement).⁵ Failure by any licensee to meet the Final Requirement results in the license being subject to the “keep-what-you-serve” process whereby the license “will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission.”⁶ Pursuant to Section 27.14(e) of the Commission’s rules, lower 700 MHz B Block licensees must make a showing of substantial service, independent of their performance requirements, as a condition for renewal at the end of each license term.⁷

Nemont acquired the Licenses from Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers) through a license assignment consummated in September 2018.⁸ Nemont states that “no equipment or customers were acquired in the license assignment transaction.”⁹ Although Nemont notes that it has been providing wireless radio service to rural Montana for approximately 25 years and has met construction requirements for several other rural Montana 700 MHz licenses, Nemont requests a waiver of the Final Requirement for the Licenses.¹⁰ Specifically, Nemont states that its construction notification currently on file for call sign WQJU690 shows 34% geographic coverage, its construction notification for call sign WQJU692 shows 23.8% geographic coverage, and it did not file a construction notification for call sign WQJQ771 because it has not constructed “any portion” of the market area and “no service is being provided.”¹¹ Furthermore, even though Nemont claims some geographic coverage for calls signs WQJU690 and WQJU692, Nemont admits that it does not have any subscribers in these license areas and “is working toward” rolling out service.¹²

In support of its request for waiver, Nemont suggests that unique circumstances justify a waiver of the construction requirement.¹³ Nemont states that it is a longtime wireless provider with a substantial record for completing construction of other licenses.¹⁴ Nemont also argues that it “tried its best” to construct the Licenses in a short time frame after the acquisition from Mid-Rivers, but that it was unable to complete buildout as it had expected.¹⁵ Finally, Nemont indicates that it plans to use the spectrum to provide service to “extremely remote, rural markets in Montana.”¹⁶

⁵ See 47 CFR § 27.14(g); *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15151-52, paras. 64-65 (2013).

⁶ 47 CFR § 27.14(g)(2). See also *Wireless Telecommunications Bureau Announces Process for Relicensing 700 MHz Spectrum in Unserved Areas*, Public Notice, 34 FCC Rcd 350 (WTB 2019). The re-licensing will occur in two phases, and a licensee can re-apply for the lost unserved areas in Phase 2 of the re-licensing if the areas have not been re-licensed to a new licensee in Phase 1.

⁷ 47 CFR § 27.14(e).

⁸ Request at 1. See File Nos. 0008293627 (assignment application filed July 31, 2018) and 0008404236 (notice of consummation filed October 17, 2018).

⁹ Request at 1.

¹⁰ *Id.* Although Nemont requests a waiver of the Final Requirement for all three licenses at issue, the prior licensee, Mid-Rivers, previously satisfied the Final Requirement at the interim deadline in 2016 for call sign WQJQ771 (see File No. 0007560823). Mid-Rivers satisfied only the Interim Requirement in 2016 for call signs WQJU690 and WQJU692.

¹¹ *Id.*

¹² Request at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1.

Discussion. A request for waiver of Commission rules must “meet a high hurdle at the starting gate.”¹⁷ It is well-established that the Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest,¹⁸ and it may take into account unique considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁹ The Commission may grant a waiver pursuant to Section 1.925(b)(3) of the Commission’s rules when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁰ In determining whether the waiver standard is met, we must evaluate each case based on the specific circumstances. For the reasons set forth below, we find that the requirements for waiver have not been satisfied, and we therefore deny the Request as it applies to call signs WQJU690 and WQJU692.

As to the first prong of the waiver test, strict application of the construction rule in this case does serve the underlying purpose of the rule – ensuring intensive spectrum use – and granting a waiver would be contrary to that purpose.²¹ Nemont describes itself as an experienced wireless licensee that has provided service to rural Montana for approximately 25 years and has completed a number of 700 MHz buildouts.²² Nemont was, then, well aware of its construction obligations when it opted to acquire the Licenses so close to the final construction deadline. Its failure to satisfy the Final Requirement was simply a business decision, and financial considerations or consequences resulting from a licensee’s business decisions do not warrant extension or waiver of a licensee’s obligations.²³ As a general matter, it remains a licensee’s responsibility to conduct its due diligence to ensure that it can meet its performance obligations under the Commission’s rules. Nemont’s business decision to acquire the Licenses late in the construction period does not justify waiver relief.

In addition, we find no unique or unusual circumstances in this case that would make application of the construction rule inequitable, unduly burdensome, or contrary to the public interest.²⁴ While the Licenses cover rural areas in Montana with low population density, Nemont has not shown that it has suffered from any specific challenges that might justify a waiver. Simply stating that a waiver would be in the public interest because the Licensee intends to serve a remote, underpopulated area, but ran out of time, does not rise to the level of unique or unusual circumstances when the Licensee does not support its request with any additional specific difficulties.²⁵ Again, having a “short time frame” within which to complete construction as a result of a business decision to acquire the Licenses does not support a grant of

¹⁷ See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

¹⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁰ 47 CFR § 1.925(b)(3).

²¹ See 47 CFR § 1.925(b)(3)(i).

²² Request at 1.

²³ See, e.g., Letter to Stefan M. Lopatkiewicz, Esq., Counsel for TelAlaska, Inc. from Roger S. Noel, Mobility Division, Wireless Telecommunications Bureau, Letter Order, 24 FCC Rcd 7380, 7384 n.30 (WTB 2006); *Redwood Wireless Minnesota, L.L.C. and Redwood Wireless Wisconsin, L.L.C. Request for Waiver and Extension of the Broadband PCS Construction Requirements*, Order, 17 FCC Rcd 22416, 22419-23, paras. 6-13 (WTB 2002); see also 47 CFR § 1.946(e)(2).

²⁴ See 47 CFR § 1.925(b)(3)(ii).

²⁵ Request at 2.

waiver relief.²⁶ We find that Nemont has not demonstrated that grant of a waiver of its construction requirement is warranted and therefore deny the Request as it applies to call signs WQJU690 and WQJU692. We dismiss as moot Nemont's request to waive the construction requirement for WQJQ771 because the previous licensee, Mid-Rivers, satisfied the Final Requirement for this license in 2016.²⁷

In conjunction with its Request, Nemont also filed construction notifications for call signs WQJU690 and WQJU692, claiming to be "covering and offering service" to portions of the relevant markets (34% and 23.8%, respectively) and to have "made an effort" to provide service to these portions of the market areas.²⁸ The Commission's rules require that the licensee provide service over at least 70 percent of the geographic area of the authorization by the final deadline.²⁹ We find that the Licensee has not shown that it is actually providing service as required by the Commission's rules, regardless of its signal coverage. Indeed, Nemont admits in the Request that the Licensee has no subscribers and is only "working toward" rolling out service.³⁰ Given our denial of the Request, call signs WQJU690 and WQJU692 automatically terminated in their entirety as of June 13, 2019 pursuant to Section 27.14(g) of the Commission's rules, and they will become available for reassignment by the Commission.³¹ Accordingly, because call signs WQJU690 and WQJU692 automatically terminated, we dismiss Nemont's renewal applications for these call signs as moot.³²

Regarding call sign WQJQ771, Nemont requests a waiver of the Section 27.14(e) requirement that a licensee make a showing of substantial service at renewal.³³ Nemont provides no additional information to support its request to waive the renewal requirement beyond what is included in support of its request for a construction waiver pursuant to Section 1.925(b)(3) of the Commission's rules.³⁴ For the same reasons discussed above in denying Nemont's construction waiver request, we deny Nemont's request to waive the renewal requirement applicable to call sign WQJQ771.³⁵

Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 CFR § 1.925, the request for waiver of Section 27.14(g) of the Commission's rules, 47 CFR § 27.14(g), filed June 13, 2019 for call signs WQJU690 and WQJU692, by Nemont Telephone Cooperative, Inc., is hereby DENIED. The request for waiver of Section 27.14(g) of the Commission's rules, 47 CFR § 27.14(g), filed June 13, 2019 for call sign WQJQ771, by Nemont Telephone Cooperative, Inc., is hereby DISMISSED as moot.

Accordingly, IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications

²⁶ *Id.*

²⁷ See *supra* note 10.

²⁸ See File No. 0008688193 (call sign WQJU690) and File No. 0008688213 (call sign WQJU692).

²⁹ See 47 CFR § 27.14(g); *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15151-52, paras. 64-65 (2013).

³⁰ See Request.

³¹ See 47 CFR § 27.14(g).

³² See Nemont's pending renewal applications in File No. 0008572491 (call sign WQJU690) and File No. 0008572493 (call sign WQJU692).

³³ See 47 CFR § 27.14(e); File No. 0008572490, Renewal Statement and Waiver Request for WQJQ771 (filed May 24, 2019) (Renewal Statement). Nemont also requests waivers of 47 CFR §§ 1.949(d), (e), and (f), but these rule sections are not yet effective and therefore do not apply to the license at this time.

³⁴ See Renewal Statement; File No. 0008572490, Supplemental Renewal Statement and Waiver Request (filed June 13, 2019); 47 CFR §§ 27.14(g), 1.925(b)(3).

³⁵ We will address Nemont's pending renewal showing for call sign WQJQ771 as a separate matter.

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Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 CFR § 1.925, the request for waiver of Section 27.14(e) of the Commission's rules, 47 CFR § 27.14(e), filed June 13, 2019 for call sign WQJQ771, by Nemont Telephone Cooperative, Inc., is hereby DENIED.

These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331.

Sincerely,

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